***United States Court of Appeals***

***for the Second Circuit***

# PETITION FOR REHEARING EN BANC

75-1237 B pds

DOCKET NO. 75/1237

4/1/76

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

*Appellee,*

*-against-*

ROBIN G. BARON, ET AL.
[INCLUDING PETER HORVAT],

*Defendant-Appellant.*

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PETITION FOR REHEARING IN BANC

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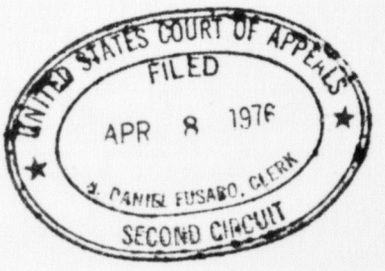


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TABLE OF CASES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 259 - September Term, 1975

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UNITED STATES OF AMERICA,

Appellee,

v.

ERIC BLITZ, PETER HORVAT, RICHARD ORPHEUS and WILLIAM DREW,

Appellants.

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PETITION FOR REHEARING IN BANC

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETER HORVAT, the appellant above-named, presents this, his petition for a rehearing in banc in the above-entitled cause, and, in support thereof, respectfully shows:

I. CONSPIRACY

1. The court has noted in its opinion that the evidence implicating Horvat in the conspiracy is largely circumstantial (16/28-32).* In such a case, each circumstance which contributes to the ultimate finding of guilt constitutes a greater quantum of the total proof than it would were there substantial direct evidence of conduct of a conspiratorial nature. It is respectfully submitted that, with respect to substantial matters, the Court has taken into account evidence which was not presented to the jury, has made findings which are not supported by the record and has misread certain crucial testimony. When these matters are removed, insufficient evidence exists to support a

*References are to the page/line(s) of the Court's original opinion.

finding of guilt on the conspiracy count.

The Involvement of Baron & Co. and Robin Baron

2. A major consideration in the Court's decision appears to be that Baron & Co. was one of the principal outlets through which Elinvest shares were sold to the public (17/7-8) and that the sale of Duke's shares outside the public market had the effect of preventing the price of Elinvest stock from being driven down (17/12-16). It is respectfully urged that the Court has failed to consider the very fact that the shares which Horvat sold belonged to Duke, who was named in the indictment as, nor proven to be a co-conspirator. No financial gain was achieved by Van Aken or his co-conspirators through the sale of Duke's stock. Indeed, it would have been considerably easier for Van Aken to control the shares in his friend Duke's hands than in the hands of a multitude of investors. The sale of Duke's shares by Baron & Co. was, if anything, contrary to the purposes of the conspiracy. Rather than channeling 35,000 shares away from the public market, it placed them in closer proximity to it.

3. The Court has recognized the fact that the only possible link between Horvat and the conspiracy was through either or both of Baron or Linder (17/25-26). Linder gave uncontradicted testimony that he had not imparted any information to Baron concerning a market manipulation, that Baron and Horvat were not involved in a manipulation of the Elinvest market and that he himself had no knowledge thereof. Nonetheless, the Court has discounted his testimony citing three reasons. The first of these is that Linder received a "payoff" to find a broker to sell Duke's shares. This so-called "payoff", however, was nothing more than a finder's fee, for which, as he testified, Linder performed substantial services in

investigating Elinvest and preparing an extensive due diligence file . Not to be ignored is the fact that he introduced Duke to a broker who indicated his willingness to take over $100,000 worth of his stock into inventory. Even Van Aken testified that he advised Duke to allow a professional to handle his shares. In any event, not only was Linder's testimony uncontradicted, but it was especially plausible in light of his background in financial and securities matters.

4. The second reason given for discounting Linder's testimony was that he made a substantial payment to Baron, This payment was explained as having been due under the terms of an underwriting agreement, which explanation was uncontradicted. The third reason given by the Court was that Linder "had conveyed to Baron a message from Van Aken that Bradley should not sell his stock because it would dilute the Elinvest market." (emphasis added). The government did not even contend that this was the nature of the conversation (Govt. Br. p. 23). The testimony was that Bradley would not sell his Elinvest shares until Baron completed the sale of Duke's shares. No mention was made of the effect of this forebearance upon the Elinvest market. This is quite different in both language and meaning from the statement which is paraphrased in the Court's opinion and, although interesting news to Baron, was unsolicited and entirely up to Bradley. Thus, it is submitted, the Court has improperly discounted Linder's testimony.

5. In footnote 33, the Court has stated that "Baron knew about the entire conspiracy from Van Aken." Van Aken's entire conversation with Baron is set forth at pages 492-493 of the trial transcript. Nowhere therein does it appear that Baron promised Van Aken

that he would have his customers hold the stock for six months so that Elinvest would remain in short supply on the market and the price would remain stable." (11/22-25)(emphasis added).Neither did Van Aken promise Baron that he intended to stay in for the long haul (11/25-26). The Court is most strenuously urged to reread those pages of the record. Upon doing so it will be found that Baron did not find out anything about the conspiracy from Van Aken. Needless to say, Baron's plea of guilty was not before the jury and is, therefore, although noted in footnote 33, not an element of proof in this case. Other than the foregoing, which, it is submitted, is a greatly erroneous finding, no other evidence has been cited by the Court linking Baron to the conspiracy.

Horvat's Involvement

6. The Court's finding of Horvat's knowledge of and participation in the conspiracy is apparently based upon a number of circumstantial factors. At several places in the Court's opinion (18/23-24, footnotes25 and 42) it is stated that Horvat knew that Baron & Co. was making $1 per share on the sale of Elinvest stock and that it was engaging in "risk-free" transactions. The record contains no support whatever for such a premise. The only person who testified concerning the risk-free nature of the transactions was John Steinert, an SEC investigator, who merely presented recaps of the transactions of Baron & Co. He said nothing which even remotely implied that Horvat was aware of this.

7. The Court has stated that Horvat "knew others were hard at work driving up the price of Elinvest." (17/31-18/1). It has been conceded that such knowledge had to come from Baron or Linder (17/

19-26) and that Linder denied telling Baron or Horvat anything about a manipulation (17/11-13). As noted above, Baron gained no knowledge of the conspiracy from Van Aken and was, thus, in no position to impart any to Horvat. There is, in fact, nothing in the record which supports this proposition.

8. In footnote 36, the Court has made particular note of a difference between what Horvat testified to before the grand jury and what he told Separ regarding retention of his Elinvest stock. Not all of Horvat's grand jury testimony was introduced in evidence and the portion to which reference is made by the Court was not a part of the record since it was not read to the jury. It is therefore improper for it to have been taken into account.

9. An inference has been drawn by the Court from the fact that Horvat was certain that the price of Elinvest was about to rise to specified levels (18/27-30). Yet, in footnote 34, the Court has found significance in the fact that different projections were made to different customers. These two statements seem unreconcilable. Finally, nothing in the record indicates that Horvat had anything to do with the failure of his customers to receive their certificates. Indeed, Frank Appoldt, a former back office employee of Baron & Co. and subsequently employed by the SEC, conceded that once a registered representative requested a certificate for his customer from the back office, it was out of his hands.

## II. SUBSTANTIVE COUNTS

### Horvat's Customers - Counts 9, 10 and 13

10. It is respectfully urged that whether the price projections made by Horvat were fraudulent was a question of fact for the jury. For the Court to lay down a hard and fast rule that "positive assu-

rances of quick profits" (17/29) are per se fraudulent, as it has apparently done, would be to say that such assurances are unjustified under any state of facts, a proposition which is in conflict with prior decisions of this and other circuits. If it cannot be said that such a rule is applicable in all such situations, the matter ought to be left up to the jury. Viewing the record in this case, the reasonableness of Horvat's belief that his projections were well-founded was certainly a sufficiently open question to require a charge to the jury thereon, such as the one which was requested and refused. Although the Court reviewed the claims of error in the charge made by Blitz, Drew and Orpheus, no consideration was apparently given to Horvat's claim in this regard. It is respectfully urged that this point be given review.

Customers of Other Defendants - Counts 7, 8, 11, 12 and 14-18

11. As is fully elaborated in Judge Mansfield's dissenting opinion, the majority has, in effect, reduced the concept of aiding and abetting to the principle set forth in Pinkerton v. United States, 328 U.S. 640 (1946). In so doing, the Court has, in essence, stated that the holding in United States v. Peoni, 100 F.2d 401 (2d Cir. 1938), relied upon by the bench and bar for years, is no longer applicable in conspiracy cases and that a lower standard now prevails. This is particularly harsh in a case such as this wherein the proof of involvement in a conspiracy is entirely circumstantial. A second look at this holding seems to be warranted.

## III. GRAND JURY

12. The Court has apparently misconstrued Horvat's argument with respect to the irregularity of the grand jury proceedings.

The essence of his claim is that a government attorney improperly took the witness stand before the first grand jury not the second grand jury. By doing so after having interrogated Horvat, the attorney improperly placed his credibility in contraposition to that of Horvat. Presumably, the entire transcript of both Horvat's and the attorney's testimony was read to the second grand jury, including the name of the questioner. Thus, the taint was carried into the second grand jury. With respect to the holding that the claim was waived by failing to raise it prior to trial, relief from the waiver can be granted for good cause shown. Fed R. Crim. P. 12(f). In this case, it was unknown to Horvat that the government attorney had testified before the grand jury until he took the witness stand at trial. It was therefore impossible to raise this point prior to trial. The statement in footnote 44, that Horvat raised this claim for the first time after trial is incorrect. The record plainly shows that a motion to dismiss the indictment was made both orally and in writing immediately after the government attorney's testimony at trial.

WHEREFORE, for all of the reasons set forth above and in our papers previously submitted and on file with this Court, it is respectfully urged that this petition be granted and that the judgment of conviction be reviewed by this Court sitting in banc.

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CERTIFICATE OF COUNSEL

I, JEROME T. DORFMAN, attorney for PETER HORVAT, do hereby certify that the foregoing petition for a rehearing in banc of this cause is presented in good faith and not for purpose of delay.

Jerome T. Dorfman

JEROME T. DORFMAN